No. 82-6352

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HENRY HANCE,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Butts County, Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the state habeas corpus court properly used an adequate and independent state ground in considering the admissibility of Petitioner's confession?

2.

Whether the state courts properly determined that there was probable cause for an arrest of the Petitioner and that Petitioner's confession was admissible?

3.

Whether the trial court properly allowed admission of Petitioner's confession after a determination that Petitioner did not request an attorney and that the authorties did not prevent Petitioner from seeing an attorney?

4.

Whether the trial court was required to conduct a sua sponte competency hearing and whether the court properly allowd Petitioner to act as lead counsel?

5.

Whether the Petitioner received effective assistance of counsel at trial?

6.

Whether the trial court excluded any relevant mitigating evidence during the sentencing phase of Petitioner's trial?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, William Henry Hance, was indicted in the Superior Court of Muscogee County in August, 1978, for the murder of Brenda Gail Faison, a/k/a Gail Jackson, and for criminal attempt, theft by extortion. (R. 18-19).1/ Petitioner was granted the right to represent himself at trial and was assisted by co-counsel, Richard Smith and Walter Johnson. (R. 15-16, 20; T. 421, 425). Following a trial by jury, Petitioner was found guilty on both charges and received the death penalty for murder under Ga. Code Ann. § 27-2534.1(b)(7) and a five year sentence for criminal attempt, theft by extortion. (R. 22-24).

An appeal was filed on behalf of the Petitioner to the Supreme Court of Georgia. Richard O. Smith and William Alexander Byars filed the brief and made argument on behalf of the Petitioner.

1/ R. refers to the record on appeal to the Supreme Court of Georgia. T. refers to the trial transcript from the Superior Court of Muscogee County. H.T. refers to the transcript of the habeas corpus hearing held in the Superior Court of Butts County.

Petitioner also filed a list of errors in his own behalf to be considered by the Supreme Court of Georgia on direct appeal, which were addressed in the court's decision. Both convictions and sentences were affirmed by the court and rehearing was denied on July 15, 1980. Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980).

A petition for a writ of certiorari was filed on behalf of the Petitioner in this Court challenging the decision of the Supreme Court of Georgia. The petition was denied on December 15, 1980. Petitioner filed a pro se motion for reconsideration in this Court which was denied on January 26, 1981. Hance v. Georgia, 449 U.S. 1067 (1980), reh'g den. 449 U.S. 1135 (1981).

A petition for a writ of habeas corpus was filed with the Superior Court of Butts County by Mr. Stephen A. Kermish on behalf of the Petitioner. A hearing was held on the petition on April 8, 1981. A brief was filed by Mr. Kermish and a brief was also filed by the Petitioner in his own behalf with that court. After a consideration of the record and evidence, the state habeas corpus court denied relief on July 27, 1981. Petitioner filed an application for a certificate of probable cause to appeal to the Supreme Court of Georgia. Petitioner filed a pro se brief in his own behalf in that court. On October 9, 1981, the Supreme Court of Georgia denied the application.

Petitioner has subsequently filed the instant petition for a writ of certiorari to the Superior Court of Butts County, Georgia, challenging the findings of that court.

Although a detailed statement of facts is set forth in the decision of the Supreme Court of Georgia, Respondent will set forth pertinent facts at this time.

During the year of 1978, the City of Columbus, Georgia, was being terrorized by the so-called "Columbus strangler" or "stocking strangler" killings. These involved the murders of a number of elderly white females who lived in the same general area. These women had all been beaten, raped and strangled by the use of a stocking or a similar item.

Between March 3rd and April 5th, 1978, Columbus Chief of Police Curtis McClung received six letters in the regular mail, allegedly from an organization known as the Forces of Evil. (T. 426-452). The letters were all written on United States Army stationery and claimed that the Forces of Evil was a white organization that had kidnapped two black women, Gail Jackson and a woman named Irene. In the first letter the writer claimed to have captured a woman by the name of Gail Jackson. The letter stated that the purpose of the group was to catch the Columbus strangler or put more pressure on the police to do so. The threat was made that if the strangler was not caught by June 1, 1978, Gail Jackson would be killed and other black female victims would follow until the strangler was caught.2/

The next letter received indicated that the Chief of Police could either catch the Columbus strangler or give $10,000 to the Forces of Evil in order to prevent the execution of Gail Jackson. This threat was the basis for the charge of criminal attempt to commit theft by extortion. Subsequent letters mentioned that a black female named Irene had been captured and was being held. The letters continued to indicate that unless the demands were met the victims would be killed. (T. 437, 440-445).

The fourth letter to the Chief of Police stated that the

2/ It is significant to note that by the time the first letter was received, the victim, Gail Jackson had already been killed.

military police desk sergeant would get a telephone call on April 1, 1978, giving the exact location of the body of Gail Jackson. (T. 447). The writer stated that the victim's arm would be broken and that "the style of execution will be a sharp blow to her head to cause instant death." (T. 447). The fifth letter was sent to a local newspaper and again threatened the life of both victims. The final letter was received the day after the Petitioner had been arrested and indicated that a third female had been captured by the group. (T. 451-453).

On March 30, 1978, Specialist George Thompson and Sergeant James Harris at Fort Benning each received a telephone call from an unidentified black male giving the location of Gail Jackson's body. (T. 459-463, 466-468). A Columbus Police Department receptionist also received a call on March 30, 1978, from a person that sounded like a black male stating that Jackson's body was by a tree near the Sand Hill Bar. (T. 471-475). The message also indicated that the body would be found approximately 100 meters past the bar and past a speed limit sign. During the conversation with the Columbus Police Department, the caller indicated that he was the Forces of Evil.

A group of law enforcement officers subsequently went to the area described in the telephone calls. The body of a black female, later identified as Gail Jackson, was found in that area. The body was covered with twigs and leaves. As noted by the Supreme Court of Georgia:

> "The beating [of the victim] was so severe that the victim's entire face was destroyed and bone fragments were scattered about the area. Some of the victim's brain tissue was literally beaten from the skull. The force

of the Appellant's attack was so great it produced a depression in the ground behind the victim's head. The Appellant then buried the victim's body in a shallow grave he dug with an entrenching tool."

Hance, supra, 245 Ga. at 856.

An autopsy was performed on the partially decomposed body. Doctor Joe Webber indicated that the entire jaw and facial structure were missing and that one could look directly into the cranial cavity where there remained only a small amount of liquified brain tissue. The doctor also found that the left elbow had been dislocated. (T. 502-503).

On April 3, 1978, a telephone call was received by a desk sergeant at Fort Benning from a man informing him that the body of a woman named Irene could be found in an area of Fort Benning called Maerten's Range. (T. 626-627). The caller, who sounded like a black male, stated that he was a member of the Forces of Evil. (T. 626-627). Following the directions from this telephone call, the body of Irene Thirkield was discovered. Once again, the skull had been broken into many pieces and several pieces were missing. (T. 647, 649). Irene Thirkield had last been seen on March 15, 1978, talking to a soldier in Vice Mitchell's Tavern. (T. 606-611, 614, 617-619). One of the witnesses identified the Petitioner as the soldier seen with the victim and stated that the two left the Tavern together. Another witness saw the victim leave with a soldier in a blue car accompanied by a man named Johnny King. King testified that he got a ride from the Tavern on that date with the victim and a soldier who let them out two or three blocks from the Sand Hill Bar. (T. 610-611, 618-622).

Mr. Marvin Besson participated in investigating the murder of Irene Thirkield and another woman who had been murdered on the military base at Fort Benning. Mr. Besson obtained the tape recordings made of the telephone calls to the military police desk at Fort Benning. Those tape recordings were the ones that indicated where the bodies could be found. The tape recordings were taken to the company commander and first sergeant of the Petitioner. Both of these individuals indicated that they thought it was the Petitioner's voice on those tapes. (H.T. 19). Richard Fox indicated that his investigation revealed that the Petitioner was the last one seen with victim Irene Thirkield. (H.T. 33). Petitioner had also been in talking to Mr. Fox on prior occasions concerning the death of a woman on the military base. (H.T. 32).3/

From the above it can be seen that the military authorities knew that the person who killed the victims was a young black male. They also had reason to believe he was a soldier on the base because, "the calls they received showed an intimate knowledge of the military reservation and the letters were written on military stationery. Also, a military cap was found near one of the bodies." Hance, supra, 245 Ga. at 864. Furthermore, they knew that the Petitioner was the last person seen with one of the victims prior to her death. In addition to all of this evidence which was presented at Petitioner's trial, the authorities also knew that Petitioner's commander and sergeant had indicated that the voice on the tapes describing the locations of the bodies was probably that of the Petitioner. Based upon all of this information, Agent Fox and Agent Besson went to the Petitioner's unit and indicated they would like to talk with the Petitioner.

3/ This victim was Karen Hickman, one of the two victims for whose murders the Petitioner was tried by the military authorities.

After being requested, the Petitioner agreed to be interviewed and was moved to C.I.D Headquarters. He was advised of the nature of the case and the fact that he had been the last person seen with one of the victims. He was advised of his rights by Agent Fox, who determined that Petitioner understood his rights and was willing to waive these rights and be interviewed without an attorney. (T. 754-755). The interview began sometime after noon on April 4, 1978. It continued during the day with breaks being taken to allow the Petitioner to eat and use the restroom. He was also given coffee and allowed to smoke. The interview was discontinued at approximately 10:20 p.m. (T. 755-758). During this session, the Petitioner admitted knowing Irene and giving her a ride, but indicated that he left her at the Sand Hill Bar. (T. 758). He also admitted knowing about a group called the Forces of Evil but said that he had been forced to write the letters by the organization. Petitioner admitted that he wrote the letters which had been received by the police and gave voluntary handwriting samples which matched the letters.

The interview was continued on the next day and the Petitioner was again advised of his rights. The interview began at approximately 8:00 a.m. and concluded at 3:30 p.m. when the Petitioner signed a written statement concerning each murder.

From the statements given by the Petitioner, it is clear that he went to the Sand Hill Bar on or about February 28, 1978. While there, the victim, Gail Jackson, attempted to solicit him for purposes of prostitution. The Petitioner agreed to pay her $20.00 and they got into his car and left. They drove about 200 yards up the road where they stopped. Once the victim began to undress, the Petitioner grabbed her and hit her with

a karate chop across her head. He then pulled her out of the car, dislocating her elbow. After he decided that the victim was still alive, the Petitioner got a jack handle from his car, and finding the victim to be breathing, repeatedly struck her in the face. Hance v. State, 245 Ga. at 856. Petitioner indicated that he wrote the letters to the police to try to throw suspicion off of himself and even placed an army cap with a different unit insignia than his own near the crime scene to avert suspicion. Id. at 857. This all took place prior to any letter being received from the Forces of Evil.

Petitioner also indicated that on March 15, 1978, he went to Vice Mitchell's Bar. He told the authorities that Irene Thirkield asked him for a ride to the Sand Hill Bar and then attempted to solicit him for purposes of prostitution. He again became angry and attacked her in the same manner as he had the first victim. He further admitted calling the military police on March 30, 1978 and telling them where to find the body of Gail Jackson. Id. at 857.

After confessing to the military authorities, the Petitioner also gave a statement to the Columbus authorities. He told them where he had disposed of the murder weapons and the clothes of the victims. A fingerprint from one of the letters was also determined to be that of the Petitioner.

Prior to trial, Petitioner was appointed counsel by the court. Mr. Richard O. Smith and Mr. Walter Johnson were to represent the Petitioner. Numerous motions were filed on Petitioner's behalf, including requests for psychiatric examinations. Petitioner was sent to Central State Hospital and examined and was also examined by a private psychologist in Columbus. No question was raised by the Petitioner or his attorneys as to

his competence to stand trial. In fact, Petitioner insisted that no further psychological testing be done. (November 27, 1978, hearing transcript at 5-6). At that time, Mr. Richard Smith made a motion to allow the Petitioner to participate in his own trial as co-counsel. The court conducted an extensive examination of the Petitioner and determined that the Petitioner was making this decision knowingly and voluntarily. The court then indicated that Richard Smith and Mr. Johnson would serve as co-counsel, even though Petitioner would be lead counsel. (November 28, 1978, hearing transcript at 11).

Petitioner participated in his own trial, conducting examination of witnesses and making argument to the jury. Mr. Richard Smith also conducted examination of some of the witnesses and presented argument to the jury at various points in the trial. At all times, Petitioner maintained his innocence in the crime. Petitioner has continued to act in his own behalf by filing a brief with the Supreme Court of Georgia, this Court after the denial of his original petition for a writ of certiorari and the Superior Court of Butts County.

At the conclusion of the trial, the jury found the Petitioner guilty of murder and the crime of criminal attempt, theft by extortion. The jury was presented with one aggravating circumstance at the sentencing phase and returned a recommendation of the death penalty based on a finding that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. Thus, Petitioner was sentenced to death on that charge.

Further facts will be developed as necessary for a more thorough illumination of the issues presented by the instant petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE STATE HABEAS CORPUS COURT PROPERLY CONCLUDED THAT THE ALLEGATION CONCERNING THE ADMISSIBILITY OF PETITIONER'S CONFESSION WAS WITHOUT MERIT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

In the first ground raised in the instant petition, Petitioner challenges the ruling by the state habeas corpus court concerning the admissibility of Petitioner's confession at trial. In raising this allegation, Petitioner overlooks the fact that this Court is not reviewing the decision by the Supreme Court of Georgia on direct appeal in the instant case, but the decision by the state habeas corpus court. A prior petition for a writ of certiorari has been filed and ruled on challenging the decision of the Georgia Supreme Court on direct appeal. See Hance v. Georgia, supra.

In the instant case, the state habeas corpus court considered the challenges to the admission of Petitioner's confession, including the allegation that the arrest was without probable cause. The court held, "The Supreme Court has already concluded probable cause for the seizure and arrest of Petitioner existed. (Cites omitted). Further, implicit in the Court's conclusion that Petitioner's statements were freely and voluntarily given is the finding that the interrogation of Petitioner was not illegal. (Cites omitted). Accordingly, the allegations in Paragraphs 7 and 8 are found to be without merit." (Habeas corpus order at 2).[4/] In considering other allegations challenging the confession, the court later merely noted again that the Supreme Court of Georgia

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4/ The order of the state habeas corpus court was submitted by the Petitioner as Appendix C.

had decided that the confession was properly admitted. (Habeas corpus order at 12).

Under Georgia law, issues covered on direct appeal are not cognizable in a state habeas corpus proceeding. After an appellate review has been conducted, the same issue will not be reviewed again in a proceeding on a writ of habeas corpus in state court. Treadwell v. Hopper, 235 Ga. 241, 219 S.E.2d 155 (1975); Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974). In the instant case, as noted by the state habeas corpus court, the question of the admissibility of Petitioner's confession was determined on direct appeal. The court found that the confession was freely and voluntarily given and properly admitted after a Jackson v. Denno hearing at trial. Hance v. State, supra 245 Ga. at 858. The court also concluded that there was probable cause for the arrest of the Petitioner. Id. at 863-4. Thus, this issue was clearly covered on direct appeal and the state habeas corpus court did not actually address the constitutional issue but relied on the state law requiring it to defer to the holding of the Supreme Court of Georgia.

This Court has long declined to review state court judgments based on adequate and independent state grounds, as long as there is no discrimination merely because a federal question is involved. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, 324 U.S. 117, 118 (1944). The adequate state ground in the instant case is the state procedural requirement prohibiting a state habeas corpus court from addressing the issues already decided on direct appeal. Petitioner's opportunity to have challenged the ruling of the Supreme Court of Georgia came in the petition for a writ of certiorari following that decision, not at a later time challenging the decision of a different court.

The state ground relied upon in the instant case clearly serves a legitimate state interest by establishing the finality of an appellate court decision. As this requirement does not discriminate merely on the grounds that a federal question has been raised, the decision of the state habeas corpus court properly relied on an adequate and independent state ground. Thus, the Petitioner has failed to show that the disposition of the federal question in the instant case was necessary to the decision by the Superior Court of Butts County. Therefore, this Court should decline to consider this issue. Stembridge v. Georgia, 343 U.S. 541, 547 (1952).

B. THE STATE COURTS HAVE PROPERLY DETERMINED THAT PETITIONER'S CONFESSION WAS ADMISSIBLE AND THAT THERE WAS PROBABLE CAUSE FOR AN ARREST.

Even if this Court decides that there was not an adequate and independent state ground for the state habeas corpus court's decision concerning the admissibility of Petitioner's confession, Respondent asserts that this issue was correctly decided by the state courts.

The main thrust of this allegation by the Petitioner is based on an allegation that there was no probable cause for an arrest of the Petitioner by the military authorities. Petitioner also attempted to rely on a decision by the military courts in the instant case. Before addressing the legal points, some factual development is necessary.

Prior to the questioning of the Petitioner, phone calls had been made to the military police and the Columbus Police Department

indicating where bodies of two victims of recent murders could be found. The individual making the phone calls indicated that he was calling on behalf of the Forces of Evil, referring to the letters that had been written to the police chief threatening the life of two of these victims. The individuals receiving the telephone calls testified that the voice was that of a young black male. The bodies were also found in the areas described by the person making the telephone calls. Due to the thoroughness of the decriptions given in these telephone calls and the indication of a familiarity with the military reservation, and the fact that metric terminology was used by the caller, the authorities felt that the person was a soldier at the Fort Benning base. This reasoning was supported by the fact that the letters written from the Forces of Evil had been written on United States Army stationery. Once the bodies were discovered, a military cap was also found near one of the crime scenes, thus further indicating that the individual was connected with Fort Benning.

Witnesses testified that a black male was seen with Irene Thirkield on the last time she was seen alive. One witness in particular indicated that this person was the Petitioner. The evidence showed that Petitioner gave her a ride on March 15, 1978. All of this evidence was presented at Petitioner's trial in state court, evem though no challenge was made to his arrest. As no challenge was made, all evidence available was not presented before the court to show probable cause.

In addition to the above evidence, testimony was given before the state habeas corpus court from Marvin D. Besson and Richard Fox. Mr. Besson testified that he participated in the investigation of the murder of Irene Thirkield as well as another victim and that he knew that the Petitioner had been seen with one of the murder victims. Mr. Besson also believed that the Petitioner

had made a telephone call to the military police telling where a body could be found. A tape recording was made of the telephone call received by the Fort Benning authorities on April 3, 1978. This tape recording was played to the Petitioner's company commander and first sergeant. They both stated that they believed that the voice was that of the Petitioner. Agent Fox testified that the Petitioner had been into his office several times and discussed the murders of Brenda Jackson, Irene Thirkield and Karen Hickman.[5/] Agent Fox also indicated that Petitioner had been relating information concerning the death of Private Hickman near the time when the body of Irene Thirkield had been found on the military base.

"Probable cause for an arrest existswhere the facts and circumstances within the knowledge of the arresting officer and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Brinegar v. United States, 338 U.S. 160 (1949)." United States v. Irurzun, 631 F.2d 60, 62 (5th Cir. 1980), quoting United States v. Ashcroft, 607 F.2d 1167, 1170 (5th Cir. 1979). The Fifth Circuit also noted in Irurzun that the evidence was to be examined in a light most favorable to the verdict in determining whether probable cause existed. A showing of probable cause requires much less evidence than that required to convict.

As noted by the Supreme Court of Georgia, the evidence in the possession of the military authorities was sufficient to "lead a reasonably cautious person to believe that Appellant had committed the offense." Hance v. State, 245 Ga. at 864.

Petitioner has challenged the fact that the decision by the

5/ The murders of Irene Thirkield and Karen Hickman served as a basis for charges brought before the military authorities.

military court relating to the other two murders produced a different result than that of the Supreme Court of Georgia.6/ Although the Petitioner has cited to the decision by the Army Court of Military Review, the record in use by that tribunal is not before this Court. The only information available for this Court is the information set forth in the decision. The military tribunal noted that there were two basic facts on which the government rested its showing of probable cause, the first being the fact that the Petitioner was the last one seen with Irene Thirkield and the second being "the Appellant's previous dealings with the military police." United States v. Hance, 10 M.J. 622 (A.C.M.R. 1980).7/ The record does not reflect the presence of the additional evidence specifically cited by the Supreme Court of Georgia in support of its finding of probable cause, nor does the record reflect a consideration of the identification of the tape recordings. Thus, in the absence of the records from the military tribunal, this Court can only speculate on the exact evidence presented to that court and on the reasons for the differences between the decision of that court and the Supreme Court of Georgia.

The main determinative factor in the instant case should be the evidence in the record which is clearly sufficient to show probable cause. In considering all available information, including the evidence added at the state habeas corpus hearing,

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6/ It should be noted that this issue was presented in the pro se brief filed by the Petitioner in the Superior Court of Butts County in support of the petition for a writ of habeas corpus. Respondent noted at that time that none of the military proceedings were before that court for consideration.

7/ It should also be noted that in the military trial, a motion to suppress the confession based on the lack of probable cause was filed, whereas no such motion was filed in the state court.

Respondent submits that there was probable cause for an arrest of the Petitioner by the military authorities.8/

Petitioner asserts that the courts of the State of Georgia had departed from the rules set down by this Court in making the decision that there was probable cause. Clearly, as previously noted, the Supreme Court of Georgia followed the decisions of this Court in finding that there was probable cause to arrest based on a finding that there was sufficient information to lead a reasonably cautious person to believe that the Petitioner had committed the offense. This is clearly in line with the decisions by this Court.

Petitioner also attempts to assert that for some reason the length of the questioning of the Petitioner should require that the confession be excluded. Petitioner was questioned over a two day period by the military authorities. During this time, Petitioner continually made incriminating statements. Petitioner was at no time abused or mistreated, but was provided with meals and allowed to smoke. Petitioner was not questioned late into the evening, nor was he questioned in the early morning hours. The questioning continued based on the Petitioner's continued incrimination of himself. This should not be sufficient to require a confession to be excluded.

As the Respondent has shown that probable cause for an arrest did exist, there is no need to determine if any subsequent confessions were tainted in any manner. The existance of probable cause precludes any necessity for the consideration of this issue.

8/ By making this argument, Respondent does not intend to abandon the argument that the Petitioner was not under arrest, but merely seeks to uphold the decision by the Supreme Court of Georgia concerning the finding of probable cause.

Petitioner goes on to challenge the admissibility of the confession, raising certain Miranda issues. The evidence submitted in the state trial clearly shows that the Petitioner was advised of his rights and signed a waiver of these rights. He was informed of the nature of the questioning, in that he was told that the interview pertained to the murder of Irene Thirkield. At no time did the Petitioner request an attorney or ask that the interview be terminated. No threats were made nor were any promises given to the Petitioner. Hance v. State, 245 Ga. at 859. Thus, the confession was made freely and voluntarily and was properly admitted at trial. Petitioner's challenge concerning his mental condition will be addressed in later allegations concerning his competency as will the allegation concerning a lawyer seeking for the Petitioner.

Respondent asserts that there was clearly sufficient evidence presented at the state trial to support a finding of probable cause. The evidence submitted at the state habeas corpus court makes the evidence in support of a finding of probable cause overwhelming. Thus, this allegation raised by the Petitioner is clearly without merit.

C. PETITIONER'S CONFESSION WAS PROPERLY ADMITTED BECAUSE THE PETITIONER NEVER REQUESTED AN ATTORNEY AND BECAUSE THE ATTORNEY ALLEGEDLY HUNTING THE PETITIONER WAS NOT BARRED FROM SEEING HIM.

At the beginning of this allegation, Petitioner overlooks two basic factual points. First of all, Petitioner asserts that an attorney was seeking "his client" and that the law enforcement officers lied to that attorney. As will be shown, neither of these are actually reflected in the facts presented at trial.

The evidence submitted at trial shows that Agent Fox and Agent Besson went to Petitioner's unit on April 4, 1978, and advised him that they would like to talk with him. Petitioner willingly accompanied the two agents to headquarters where he was advised of the nature of the matter which they wanted to discuss with him. Petitioner signed a waiver form and agreed to be interviewed without an attorney. (T. 683-684). According to Agent Fox, at no time during the entire period of the interview did the Petitioner indicate that he wished to have an attorney present. (T. 683).

The interview on the first day lasted from approximately 1:45 p.m. until approximately 10:20 p.m. Breaks were taken for an evening meal and to allow the Petitioner to go to the restroom. Petitioner was allowed to smoke, was furnished cokes and coffee and anything else that he requested. (T. 686).

Petitioner was taken to the bachelor enlisted quarters for the evening. The interview was scheduled to commence at 8:00 a.m. the next morning; however, when Agent Fox arrived at his office at approximately 7:30 a.m., Petitioner was there and

stated he was anxious to get started with the interview. Petitioner again was advised of all of his rights and again signed a waiver form. (T. 689-691). Shortly after the lunch break, Petitioner began admitting his direct participation in the crimes. After this, written statements were taken concerning all of the murders and Petitioner signed the statements. (T. 693-695). The interview concerning the particular case involved in state court concluded at approximately 3:15 p.m.

On the morning of April 6, 1978, Agent Fox learned that someone may have acquired an attorney for the Petitioner. He immediately informed the Petitioner of that fact and indicated that an attorney was looking him. The Petitioner expressed surprise and stated that "he guessed the whole world knows what I'm doing now." (T. 697). When asked if he wanted to talk with the attorney, Petitioner indicated that he did not. (T. 696-697).

On that same day, Petitioner was interviewed by Detectives Rowe and Day of the Columbus Police Department. He was again advised of his rights and again signed a waiver form. (T. 708-710). At no time during this interview did Petitioner indicate that he wanted an attorney or wanted to exercise any of his rights.

A Jackson v. Denno, hearing was held at trial concerning the admissibility of Petitioner's confession. Petitioner testified in his own behalf and admitted signing the waiver forms and being advised of his rights by Agent Fox. The only contradiction in Petitioner's testimony and that of the officers is that Petitioner asserted that after he signed the waiver, he requested to see an attorney. Petitioner then asserted that his confessions had been coerced by Agent Fox. At no time during the Jackson v. Denno hearing did Petitioner call

any attorney to testify as to his search for the Petitioner.

After the conclusion of the Jackson v. Denno hearing, and after the conclusion of the state's evidence, the Petitioner presented as his first witness Attorney David Clark. Mr. Clark testified that he attempted to locate the Petitioner after he heard of his arrest. (T. 908). Mr. Clark testified that he was not retained to represent the Petitioner and merely wanted to advise the Petitioner of his rights. Mr. Clark had previously represented the Petitioner in a divorce case, but did not handle any criminal matters and did not intend to represent the Petitioner in the criminal trial. (T. 915-917). Mr. Clark could not remember the exact days that he tried to contact the Petitioner or on what day he actually eventually saw the Petitioner. He testified that his purpose in trying to locate the Petitioner was only to make the Petitioner aware "of what his rights were, and be sure that he had the opportunity for counsel." (T. 915). Thus, Mr. Clark clearly was not Petitioner's counsel at this time, but had merely represented the Petitioner on a case in the past. Mr. Clark did not intend to represent the Petitioner in this case and had not been retained to represent him. Mr. Clark did indicate that he received a card from the jail signed by the Petitioner asking him to come and talk with him; however, this was apparently sent after the Petitioner had previously waived his rights and made the statements to the authorities.

Based on all of this testimony, it is clear that there was no attorney actually representing the Petitioner who was attempting to see him during the interview. Furthermore, there is no evidence that any individuals deliberately concealed the Petitioner's whereabouts from Mr. Clark. Mr. Clark was hunting for the

Petitioner during the time when he was being transfered from one facility to another and, thus, Mr. Clark was simply unable to locate him. There has been no evidence that any authorities misrepresented the facts to Mr. Clark. It is quite conceivable that the different departments did not have custody of the Petitioner at the time that they were asked by Mr. Clark. Once the authorities learned that Mr. Clark was looking for the Petitioner, the Petitioner was made aware of this fact. Clearly, the Petitioner specifically waived his right to counsel and even reaffirmed this waiver by declining to speak with Mr. Clark when informed by the authorities that Mr. Clark was looking for him. This is further supported by Petitioner's later decision to represent himself at trial.

The state habeas corpus court considered this allegation and determined that it was without merit. The court noted, "The attorney testified that he did not handle criminal matters, was not retained but simply wanted to advise the Petitioner of his rights...The agents interrogating Petitioner testified they did not know of the attorney's attempts to locate Petitioner, but when they learned of this fact they immediately told the Petitioner, who had already confessed, and he refused to see him." (Habeas corpus order at 3). Thus, this is clearly a case in which an individual made a voluntary waiver of the right to counsel and not a situation in which counsel was prohibited from seeing his client.

The situation in Escobedo v. Illinois, 378 U.S. 478 (1964), is factually distinguishable from the instant case, as are the other cases cited by the Petitioner. In Escobedo, the attorney apparently did represent the Defendant and the Defendant was at the same time asking to see his attorney. In State v. Jackson,

303 So.2d 743 (La. 1974), the court was faced with a situation in which an attorney had actually been retained to represent a defendant. The remainder of the cases cited by the Petitioner in support of his proposition all refer to an attorney trying to see "his client." This is clearly distinguishable from the instant case in which Mr. Clark clearly indicated that he had no intention of representing the Petitioner. Furthermore, in the instant case, as soon as the agents conducting the interview knew of the attempts by Mr. Clark to locate the Petitioner, they informed the Petitioner of this fact.

The Petitioner cites this Court to a provision in the Model Penal Code of Pre-Arraignment Procedure. The section cited by the Petitioner specifically refers to "an attorney undertaking to act as counsel for an arrested person". Model Penal Code of Pre-Arraignment Procedure § 140.7 (1975). The evidence is uncontroverted in the instant case that Mr. Clark was not undertaking to act as counsel for the Petitioner but was merely ascertaining that the Petitioner knew of his rights.

Petitioner also asserts that the evidence is uncontroverted that false information was given to Mr. Clark to delay communication. This is a blatantly incorrect statement of the facts as set forth at the trial. The uncontroverted evidence shows that the officers questioning the Petitioner knew nothing of Mr. Clark's search until after the Petitioner had given statements. No evidence is presented to show that any information given to Mr. Clark by the various authorities was incorrect. The Petitioner was in different locations during the several days in question and it would be quite easy for confusion to result as to his whereabouts. Mr. Clark testified that he was unsure of the date on which he started to look for the Petitioner.

He related his inquiry as follows:

> "I looked at the article [in the newspaper] to see exactly what it said, and then called the Columbus Police Department and asked them if they had Mr. Hance there, and they told me they didn't, that they believed he was at Fort Benning. I called the County Jail and they told me they thought he was at Fort Benning. I called the stockade at Fort Benning, they said he had been sent to Columbus, they didn't have him."

(T. 907-908). Later when Mr. Clark went by the Police Department, one of detectives indicated that they did not have the Petitioner. At no point has it ever been shown in the record that any of the statements made by any of the authorities were incorrect. Thus, Petitioner's allegation that false information was presented is not supported by the record.

Petitioner also asserts that he was "interrogated constantly by relays of police officers...until he confessed." Once again, the evidence does not support this factual conclusion. Petitioner was questioned by two agents from the military criminal investigation division at Fort Benning. This interview began on one day and was conducted for approximately ten hours with breaks being taken throughout that time. Petitioner was questioned on the second day for approximately eight hours, once again with breaks being taken. This hardly constitutes a constant interrogation as asserted by the Petitioner.

Petitioner also complained of his waiver of his right to counsel at the time of making this confession. Clearly, the

evidence submitted at the Jackson v. Denno hearing is sufficient to support such a waiver. Petitioner signed a waiver of counsel form and indicated to the authorities that he wished to waive his right to counsel. The only evidence presented in contradiction to this is Petitioner's one statement that he did request an attorney. The state clearly established by a preponderance of the evidence that the waiver was knowing and voluntary. See Lego v. Twomey, 404 U.S. 477, 489 (1972).

It is clear from the evidence in the record that Petitioner was not denied his right to have an attorney present. The law enforcement officers did not misinform Mr. Clark. He merely talked with officers who did not know Petitioner's location. Furthermore, even when Petitioner was advised of Mr. Clark's presence, he declined to talk with him. Mr. Clark was not acting as counsel for the Petitioner, but was merely ascertaining the Petitioner knew of his rights. Thus, the evidence clearly supports a finding that Petitioner made a knowing and voluntary waiver of counsel and that no attorney who represented the Petitioner was precluded from seeing him. Thus, this allegation is clearly without merit.

D. THE TRIAL COURT WAS NOT REQUIRED TO CONDUCT A SUA SPONTE COMPETENCY HEARING AND PROPERLY ALLOWED THE PETITIONER TO ACT AS LEAD COUNSEL AT HIS TRIAL.

Petitioner raises two challenges based on his alleged competency at the time of his trial. The first of these challenges is addressed to the fact that the trial court did not conduct a sua sponte competency hearing prior to the trial. The second allegation is addressed to the inquiry made by the trial court when determining that Petitioner should be allowed to act as lead counsel at his trial.

In considering the first half of this allegation, it is relevant to note that the first of Petitioner's argument at the state habeas corpus hearing was that the trial court did not properly determine that he was competent to act as counsel and was not addressed to Petitioner's competency to stand trial. No evidence was presented to show what the trial court knew concerning Petitioner's competency, nor was it ever asserted that a competency hearing should have been held sua sponte by the court. This fact is readily apparent in considering the order of the state habeas corpus court. The findings of fact and conclusions of law relating to this allegation in the habeas corpus court are all directed to Petitioner's decision to act as his own counsel, not to Petitioner's actual competency to stand trial. Thus, Respondent asserts that this particular allegation has not been raised and addressed at any time prior to the instant petition. Thus, this Court should decline to review this question. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Even with this issue properly before the Court, it is clear that no evidence was ever presented to show that the trial court knew of sufficient facts to require it to conduct a sua sponte competency hearing. The only evidence in the record from the trial court concerning Petitioner's competency is found in the hearing conducted on November 27, 1978, to decide various motions presented by the defense.[9/] At that time Mr. Richard Smith, appointed counsel for the Petitioner, stated as follows:

> "Mr. Smith [the district attorney] has sent Mr. Hance to the Central State Hospital in Milledgeville, Georgia, with the evaluation and examination and it is my understanding from the information we received from them that it was their feeling that he was competent to aid and assist us as co-counsel and as a defendant in the case. We have also had Mr. Hance examined by Mr. Lewis Lieberman, who is a psychologist here in Columbus. Mr. Lieberman suggested that there may be some character disorder that might be further examined to determine Mr. Hance's present mental status. However, he talked with Mr. Hance and he [Mr. Hance] has requested that no further psychiatric examination be made or taken. He feels this to be a rational request and in view of what Mr. Lieberman has said and what they also said has been done at Central State Hospital, it seems like

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9/ The transcript of this hearing is submitted as a part of the Appendix to the Brief in Opposition to Certiorari.

> he is competent to make this request or he has requested that he be allowed to participate as we [sic] counsel in this case and to handle the primary body of the proceeding."

(November 27, 1978, transcript at 5-6).) No other evidence was presented to the court at that time concerning the competency of the Petitioner.

Although Petitioner has included several letters in the appendix to his petition, these letters do not appear anywhere in the record from the trial court. Two of the letters are from personnel at Central State Hospital and are addressed to Judge John H. Land. Judge Land did not conduct the trial in the instant case, although we can speculate that these were presented to the trial judge. The first of these letters indicates that Mr. Hance was aware of courtroom procedures and knew the charges against him and was competent for trial. A further letter from Dr. Wildman indicated a little more detail concerning the results of the tests given to Mr. Hance, emphasizing the types of people that normally have similar profiles to that suggested by the testing. At no time did Dr. Wildman state that Petitioner was incompetent to stand trial. A third letter was included in the appendix from Dr. Lewis Lieberman to counsel for Mr. Hance. This letter is marked confidential and there is no evidence that it was presented into the record. Furthermore, Dr. Lieberman merely speculates as to Petitioner's ability to assist in his own defense based on his alleged inability to see the situation from a different point of view than his own. The final letter is from a Dr. Begley and is addressed to Dr. Lieberman. Once again, there is no showing that this was ever placed into the record. This letter is based only on the results of Rorschach

tests that were sent to him. Apparently, Dr. Begley did not ever see or personally examine the Petitioner. The letter also does not indicate that Mr. Hance would be incompetent to stand trial.

The only indication anywhere in the record as to the evidence within the knowledge of the trial judge is seen from the report of the trial judge.[10/] In that report, the trial judge is specifically asked to relate the pertinent psychiatric and psychological information revealed. The judge in this case stated as follows:

> "Good physical condition; dull-normal intelligence; anxious, depressed, apathetic; expressed feelings of worthlessness. No previous mental health contact. Not psychotic."

(Report of trial judge, 1). Attached to this report is a letter from Petitioner's trial counsel, Mr. Richard O. Smith. In that letter, counsel states that evidence was introduced at a pre-trial hearing concerning Dr. Lieberman's examination, although no such actual documentary evidence appears in the record. Counsel stated that from Dr. Lieberman's report there was some definite character disorder, but that the Petitioner himself specifically requested that the matter not be pursued any further. (Report of trial judge).

Petitioner bases a large portion of his argument that he was incompetent to stand trial on evidence not available to the trial judge at the time this decision was made. Petitioner takes the letters written from the Forces of Evil to the police department and asserts that these show that he was mentally incompetent. It should be noted that these letters were not

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[10/] The report of the trial judge is included as a part of the appendix to this Brief in Opposition to Certiorari.

presented to the court until they were introduced as exhibits during the trial. Thus, the court could not possibly have any indications as to Petitioner's competence from these letters. Furthermore, rather than being "replete with ravings," these letters actually show a deliberate and concerted effort to throw suspicion off of the Petitioner and to build a cover story concerning the murders. Rather than these letters showing that Petitioner is incompetent, they actually show that Petitioner was intelligent and had sufficient mental ability to concoct such a deception. Petitioner also refers to the manner in which the killings were conducted. This also did not come out until during the trial and was shown from the confessions of the Petitioner. This is clearly not evidence that was available to the trial judge prior to the trial being conducted. Furthermore, evidence concerning the manner in which the victims were killed could possibly relate to Petitioner's sanity at the time of the crime, but would not necessarily have any reflection on his competency to stand trial.

From the evidence, the trial court apparently knew that Petitioner had received psychiatric and psychological examinations. The trial court also knew that Petitioner had been found competent by the doctors at Central State Hospital. There is some indication that the judge knew that one doctor had indicated that the Petitioner had some character disorders, but nothing was presented sufficient to show that Petitioner was in any manner incompetent to stand trial. Furthermore, the court questioned Petitioner thoroughly on that same date to determine Petitioner's ability to act as counsel. Under these situations, a hearing as to competency was not required, particularly in view of the fact that Peti-

tioner himself insisted that no further psychiatric proceedings be held.

This Court's decision in Pate v. Robinson, 383 U.S. 375 (1966), relied on by the Petitioner, did address the issue of a trial court's obligation to conduct a sua sponte competency hearing. In Pate, there was uncontroverted testimony from at least four witnesses concerning a long history of disturbed mental behavior. There was testimony that the Defendant had been hit on the head with a brick as a young child and had shown very erratic conduct over the years. He had tried to commit suicide on one occasion and had even killed his own son prior to the murder involved in Pate. Four defense witnesses stated that the Defendant was insane. Id. at 378. The record also revealed that defense counsel insisted throughout the trial that the Defendant's present sanity was in question and the prosecution even suggested that the psychiatrist needed to be present to testify as to sanity. Id. at 384. The decision in Pate rested on the fact that the trial court blatantly ignored uncontroverted testimony of a prior history of mental problems, including hospitalization for these mental problems. In the instant case, there is no such evidence found in the record. The Pate decision presents a factual situation involving a record filled with evidence concerning the Defendant's incompetency, whereas in the instant case, any evidence which might be present supported a finding of competency.

Under Pate and later decisions, it is generally determined that a court must conduct a sua sponte inquiry into a defendant's competency if sufficient doubt exists as to the competency to stand trial. Pate, supra; Acosta v. Turner, 666 F.2d 949 (5th Cir. 1982). Acosta presented a factual

situation similar to that in Pate in that considerable psychiatric evidence was presented, including the fact that the Defendant had been treated for a year and a half at a state hospital based on a prior finding of incompetence. The court in Acosta expressed its own concern with the Defendant's competency by returning Defendant for further examination before imposing sentence. Once again, this is completely distinguishable from the instant case.

The trial court in the instant case had no knowledge of any past medical or mental history, nor has any been shown at this time. There is no evidence that Petitioner's behavior at trial suggested any question of incompetency, nor was the opinion of any of the experts sufficient to require such a hearing on competency. Thus, Respondent asserts that the trial court was not required to conduct a hearing on Petitioner's competency, particularly in light of Petitioner's insistence that no further psychiatric examination be conducted and that such a path not be pursued.

Petitioner's second allegation in this regard relates to his competency to act as co-counsel. This was the thrust of the allegation presented in the state habeas corpus court. Petitioner has asserted that the trial court did not follow the requirements of Faretta v. California, 442 U.S. 806 (1975), and did not properly determine that he knowingly and intelligently gave up the benefits associated with the right of counsel.

It is clear under the law of the State of Georgia as well as the United States that an individual has the right to represent himself in state or federal court. Faretta, supra. The State Constitution of Georgia also provides that an individual has the right to proceed either pro se, by counsel or

both. Ga. Const. Art. I, Sec. I, Par. IX (Ga. Code § 2-109). It is also well-established that an individual must knowingly and intelligently forego the benefits that he relinquishes if he determines to proceed in his own behalf. However, a Defendant need not have the skill and experience of a lawyer in order to be able to choose self-representation. Technical legal knowledge is not relevant to an assessment of the knowing exercise of a right to defend one's self. Faretta, supra, at 836.

As noted previously, a hearing was conducted on November 27, 1978, at which time the Petitioner's motion to act as his own counsel was heard. At this hearing the court was made aware that the Petitioner had been sent to Central State Hospital by the state for an examination. Although there was some indication that Dr. Lieberman found a character disorder, Petitioner specifically requested that no further psychiatric examination be conducted.

Contrary to Petitioner's assertion, the trial court conducted a thorough examination at that time into Petitioner's decision to represent himself. The district attorney specifically asked the court to make an inquiry into this matter. The following colloquy transpired:

"THE COURT: Mr. Hance, have you ever witnessed a trial in progress before, trial of a criminal case?

MR. HANCE: Yes.

THE COURT: Are you aware that this is what is termed a capital case in which the maximum penalty might call for execution?

MR. HANCE: Right, sir.

THE COURT: Do you feel that you are competent to handle this case from a physical standpoint, emotional, mental standpoint?

MR. HANCE: Right, sir.

THE COURT: You understand that the Court will see to it that your rights are protected in the case, of course, but one of the rights being that you are entitled to be represented by counsel. At this point you are represented by counsel. You also have the right to represent yourself, do you understand these?

MR. HANCE: Right, sir.

THE COURT: And you are willing to allow Mr. Smith [Mr. Richard Smith], then, to consult with you, participate in the trial according to your instructions and your directions?

MR. HANCE: Right, sir.

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THE COURT: All right, sir. For the purposes Mr. Hance, let me ask you: Have you had any legal training of this type yourself?

MR. HANCE: Just, I just watched, your Honor.

THE COURT: You have never participated as an Attorney?

MR. HANCE: No, sir.

THE COURT: But, do you realize the trial of the case is subject to any number of rules having to do with the admissibility of evidence, the procedural rules as to who gets to proceed when and in what fashion and that the Court must make the determination of how the rules are to be followed?

MR. HANCE: Right, sir.

THE COURT: Do you feel that you are so well versed in these proceedings and rules and the substance of the law that you can give yourself adequate representation in your own case?

MR. HANCE: Also with my attorney here for the rules. So that will keep me from breaking any laws while I am here."

(November 27, 1978, transcript at 7-9). The court then went on to question the Petitioner further concerning his knowledge of the court's ruling on objections and his conduct during the hearing. The court specifically instructed Mr. Richard Smith to advise Petitioner fully during the trial and to assist in whatever manner Petitioner desired. He also instructed the Petitioner that he could redesignate anyone he chose as lead counsel at any time during the case.

Richard Smith informed the court at the hearing that Petitioner was proceeding against Mr. Smith's advice. He also told the court that the Petitioner did not want to discuss trial tactics with Mr. Smith. This further indicates Peti-

tioner's explicit desire to proceed in his own behalf and not to rely on counsel.

At the conclusion of the trial, Mr. Richard Smith introduced an agreement signed by Petitioner prior to trial. The agreement reads as follows:

> "I, William Henry Hance, have decided of my own free will to handle the trial of my case by myself. Attorney Richard O. Smith has advised me of the dangers in being my own attorney. I have not advised Mr. Richard O. Smith nor his assistant, Walter F. Johnson, Jr. of what my defense is nor of the name or expected testimony of any one of the witnesses that I intend to call.
>
> It was my feeling that I was competent to handle my own case."

(R. 20; T. 1034). This statement was signed by the Petitioner and notarized. At the time it was introduced, the court asked the Petitioner if he signed the statement and if it was correct. Petitioner responded that he did and that the statements were correct.

From the statements signed by the Petitioner, it is clear that his attorney did advise him of all of the dangers involved in representing himself. Although the court did not set forth these dangers specifically, the court did make a sufficient inquiry to determine that Petitioner was making a knowing and voluntary decision to proceed in his own behalf. Petitioner was thoroughly questioned by the court and the court

made a decision that Petitioner's choice was knowing and voluntary. It should also be specifically noted that two appointed attorneys sat with the Petitioner and assisted him actively throughout the trial.

Respondent submits that the record is clear that Petitioner freely and voluntarily made an intelligent decision to forego the traditional benefits associated with the right to counsel. The trial court complied completely with the requirements of Faretta v. California, supra. Furthermore, this is not a case in which Petitioner was completely without counsel. Petitioner had two attorneys actively assisting him throughout the trial in conducting much of the examination of witnesses and even presenting argument in Petitioner's behalf. It is also relevant to note that Petitioner has continued to file briefs in his own behalf since his trial and, thus, has continued to assert his right to self-representation. Thus, it is clear that this allegation is without merit.

E. THE STATE HABEAS CORPUS COURT PROPERLY DETERMINED THAT THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Petitioner has presently challenged the effectiveness of his trial counsel based on alleged omissions on the part of counsel. Petitioner also attempts to assert that this Court needs to grant certiorari to determine what standard will be applied in considering the effectiveness of trial counsel. Respondent asserts that this is totally unnecessary, because as noted in the petition, most federal courts apply a similar standard. The standard applied by the state habeas corpus court is the same as that employed by the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals and is one of the more strict standards for governing the effectiveness of counsel.

The new Eleventh Circuit Court of Appeals has recently held, "The law on effective assistance of counsel is well-settled. Although a criminal defendant is entitled to counsel reasonably likely to render and actually rendering reasonably effective assistance, reasonably effective assistance does not mean assistance without error." United States v. Gibbs, 662 F.2d 728 (11th Cir. 1981). This is the same standard used by the former 5th Circuit and presently used by the state courts of Georgia. See MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974). It is also well-recognized that a consideration of the effectiveness of counsel requires an inquiry into the actual performance of counsel and a determination whether representation was reasonably effective must be based on the totality of the circumstances. United States v. Gibbs at 730; Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980). Thus, in order

to determine if Petitioner received effective assistance of counsel, this Court must examine the actions of counsel in light of the entire trial.

A critical factor in examining the effectiveness of counsel in the instant case is Petitioner's insistence on representing himself at trial. Although Petitioner did agree to allow Mr. Richard Smith and Mr. Johnson to assist him and to act as co-counsel, Petitioner did not inform them of any of his tactics or defenses. This initially presented both Mr. Smith and Mr. Johnson with a considerable handicap. Furthermore, Respondent asserts that as Petitioner did assert his right to self-representation, he should not now be allowed to complain that the quality of the representation he received amounted to a denial of effective assistance of counsel. See United States v. Rowe, 565 F.2d 635 (10th Cir. 1977). This should be true even though Petitioner did have co-counsel in the instant case, when the Petitioner specifically refused to present certain information to such counsel.

In the instant case Petitioner himself started to conduct the voir dire examination and then relinquished control of that examination to Mr. Richard Smith. Petitioner subsequently cross-examined approximately thirteen of the state's witnesses and presented a closing argument on his own behalf. At one point during the trial Petitioner presented certain papers to the trial court which he had not allowed Mr. Smith to see nor had he consulted with Mr. Smith about these papers. (T. 598-600). When Petitioner decided to testify at the Jackson v. Denno hearing, Mr. Smith indicated that he would have to allow Mr. Hance to merely testify without Mr. Smith asking questions, as Petitioner had not informed Mr. Smith what he intented to say. (T. 736).

Petitioner himself made the decision as to what witnesses would be called in his defense and as to what evidence would be presented in mitigation. Thus, he can hardly be allowed to challenge the effectiveness of his co-counsel at this time when these decisions were made by the Petitioner on his own. Counsel can hardly be expected to call witnesses to testify when he has no knowledge of their existence.

In spite of Petitioner's insistence on representing himself and the fact that he should be considered to have waived this particular allegation, Respondent asserts that the evidence shows that Mr. Richard Smith and Mr. Walter Johnson rendered reasonably effective assistance under the facts of this case. Mr. Richard Smith was the main assistant to the Petitioner during the trial, although Mr. Johnson was present and did assist somewhat. Prior to trial, Mr. Smith filed a motion for a complete recordation of the proceedings (R. 8; M.T. 3) 11/; motion for individual voir dire and the sequestration of the jurors (R. 9-10; M.T. 3); motion to prohibit jury dispersal (R. 11; M.T. 3); a Brady motion and a motion to compel disclosure (R. 12-14; M.T. 4); the motion to allow Petitioner to participate as co-counsel (R. 15-16; M.T. 5); and a motion for a change of venue. (R. 17; M.T. 13). This last motion was withdrawn at the request of the Petitioner himself. Mr. Smith also filed a motion requesting funds for the examination conducted by the independent psychologist. This motion was subsequently granted. (R. 28). Mr. Smith filed the motion for a new trial and also filed a notice of appeal and the brief on direct appeal in conjunction with Mr. Alex Byars. (R. 1, 25).

11/ M.T. refers to the transcript of the hearing on these motions conducted on November 27, 1978. This transcript is included in the appendix with this brief.

Mr. Richard Smith conducted the general voir dire of the potential jurorsand after Petitioner examined one juror individually, Mr. Smith continued the remainder of the examination of these jurors. Petitioner now asserts that counsel failed to have one particular juror excused for cause based on her alleged indication of bias. This was potential juror Brenda T. Owens. (T. 294-298). In considering the jury selection process, it is clear that, while this juror was not excused for cause, it was also not necessary for the defense to use a peremptory strike to have her removed from the jury. Twelve jurors were chosen well before Ms. Owens was ever presented to counsel for consideration. Three alternates were also chosen, with the final alternate being Mr. John Jones who was the juror immediately preceding Ms. Owens. (T. 390). Thus, this could hardly be considered ineffective assistance of counsel when the juror did not serve on the Petitioner's jury and when it was not even necessary to use a peremptory strike to remove her from the jury.

Throughout the trial, Mr. Smith exhibited numerous actions showing his effectiveness. He requested that no one be allowed to bring newspapersinto the courtroom to prevent headlines from being exhibited to the jury. (T. 396). Mr. Smith made approximately forty different objections throughout the trial to various questions, pieces of evidence and comments by the prosecution, including an objection to the opening statement by the prosecution. (T. 414, 437, 449, 454, 461, 462, 467, 468, 473, 475, 489, 497, 518, 533, 568, 607, 615-617, 622, 631, 636, 659, 711, 743, 754, 851, 901, 916, 1034, 1059). Counsel also moved for a directed verdict concerning the extortion charge and requested that the court bring the jury back to present a charge on venue. (T. 1036, 1103). Counsel had the jury polled both after the guilty verdict and after the sentence.

Mr. Smith presented a lengthy argument on behalf of the Petitioner at the guilt-innocence phase of the trial and also presented argument during the sentencing phase. (T. 1042-1053; 1164-1176). Three witnesses were called in Petitioner's behalf at the guilt-innocence phase and Petitioner testified in his own behalf at the sentencing phase.

In addition to performing all of the above as counsel, Mr. Smith assisted the Petitioner when Petitioner was acting in his own behalf. Numerous conferences were held between the two during the trial as can be seen from the transcript. (T. 495, 601, 613, 720, 808, 906, 979, 985, 1033). Mr. Smith conducted the cross-examination of the various expert witnesses as well as certain other witnesses presented.

All of this evidence clearly supports the finding by the state court that Mr. Smith "prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and lack of cooperation by Petitioner. The effort Mr. Smith put forth was certainly reasonably effective within the meaning of the standard." (Habeas corpus order at 12).

Petitioner has raised certain specific points that he alleges make Mr. Smith's assistance ineffective. The majority of these allegations relate to the failure to make certain objections or to present certain witnesses. All these allegations are clearly a matter of trial tactics and strategy and are not sufficient to show ineffective assistance of counsel, particularly when the strategy and tactics were decided by the Petitioner himself and not Mr. Smith. Furthermore, when an allegation of ineffective assistance of counsel is premised on specific acts or omissions of counsel it is generally held

that these allegations must be supported by a showing of injury or prejudice to the Petitioner. Lovett v. Florida, 627 F.2d 706 (1980). It is not for later courts to speculate as to the possible reasons counsel may have had for failing to object. Tyler v. Phelps, 643 F.2d 1095, 1100 (5th Cir. 1981). Furthermore, tactical decisionswill not constitute ineffective assistance simply because, in retrospect, it may appear that counsel made the wrong chose. Beckham v. Wainwright, 639 F.2d 262, 265 (5th Cir. 1981).

Petitioner mentioned numerous complaints against his counsel under the statement of the case which were not later reiterated in the body of his petition; however, Respondent will briefly address these allegations at this time. Furthermore, certain allegations were raised i.. which Petitioner asserted that counsel was ineffective for failing to object when it was not later stressed that these charges or pieces of evidence were erroneous. Respondent will also address these briefly.

Petitioner initially asserted that his attorney was ineffective for failing to object to the legality of his arrest. Respondent has previously noted that, while it is not conceded that Petitioner was even under arrest, there was clearly sufficient evidence to support a finding of probable cause to arrest the Petitioner.

Petitioner also alleges that counsel should have raised a defense of insanity and should have insisted on a competency hearing. It is hard to understand how this ground can be raised at this time when the main reason this was not done prior to trial is due to Petitioner's own insistence that it not be done. Mr. Smith indicated to the court that Petitioner refused to undergo any further psychiatric exams and wanted to proceed

with the trial. Furthermore, Petitioner has presented no evidence to show that he was insane at the time of the crime nor has he shown that he was incompetent at the time of trial.

Numerous complaints were made as to counsel's failure to object to the introduction of certain evidence and to certain comments by the prosecution. It has previously been determined that the evidence complained of was properly admitted at trial and that the prior arrest complained of was even commented on by the Petitioner himself in his own argument. In considering prosecutorial misconduct, this must be viewed in the context of the trial as a whole. In considering it this way, it is clear that there was no prosecutorial misconduct sufficient to render the trial fundamentally unfair. Thus, counsel was not ineffective for failing to object to any comments made by the prosecution. See Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981).

Petitioner also complains that his counsel failed to request a charge on venue and pursue the question of jurisdiction properly. Counsel constantly pursued the issue of whether jurisdiction should lie in state court or federal court and was under the impression that the trial court would give a detailed instruction on venue. After the court did not give such an instruction, counsel requested that it be given. The court indicated that it felt that the general charge was sufficient.

Petitioner complains that counsel did not properly object to the testimony of Dr. Carl Smith concerning a psychiatric examination of the Petitioner. (T. 980-1). Although counsel did not initially object, there was no need because Dr. Smith raised the question of the psychiatrist-patient privilege himself. This evidence was completely excluded by the court based on this privilege.

The allegation that counsel was minimally prepared to conduct cross-examination is clearly without merit. The cross-examination conducted by counsel was thorough and adequately covered all issues. The mere fact that counsel did not know until shortly before the witness was examined who would conduct the examination does not mean that he was not prepared.

Petitioner also asserts that Mr. Smith did not call witnesses at the sentencing hearing in his behalf. Once again, this relates to a tactical decision made by the Petitioner by himself. It was clearly stated by Mr. Smith at the beginning of the hearing that Petitioner only wished to present his own testimony and not call any other witnesses. Based on this fact, Petitioner can hardly now blame his co-counsel for failing to call any additional witnesses when he did not tell counsel any witnesses that would be available to call and when the specifically indicated that he did not want other witnesses called.

In the statement of the case, Petitioner indicated that the trial court's charge was burden-shifting and impermissible and that counsel should have challenged this charge. Petitioner did not challenge the charge in any of his reasons for granting the writ in his brief; however, Respondent will briefly address this charge.

The pertinent portion of the charge to the jury reads as follows:

> "I'm going to give you certain presumptions of law which are applicable in this case. A presumption is a conclusion that the law draws from given facts. Now, each of these presumptions is rebuttable, that is, they

are subject to being overcome by evidence to the contrary. Now, these are as follows: Every person is presumed to be of sound mind and discretion. This presumption may be rebutted. The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. But these presumptions may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts, and that's you the jury, may find such intention upon consideration of the words, the conduct, the demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

A specific intent to commit the crimes charged in this indictment, each count thereof, is an essential element that the State must approve beyond a reasonable doubt. Intent is always a question for the jury and it's ordinarily ascertained by conduct. Intent may be shown in many ways provided you find that it existed from the evidence produced before you. It may be inferred from the proven circumstances or by acts and conduct, or it may be presumed when it is the natural and necessary consequence of the act."

(T.1093-1094).

Petitioner has challenged this charge and the effectiveness of his counsel for failure to object to this charge and asserted that it was impermissibly burden-shifting. Respondent asserts that the charge as given and when considered as a whole, was permissible.

There exists no per se rule against charging the truism that a person is normally presumed to intend the natural and probable consequencies of his actions. United States v. Chiantese, 560 F.2d 1244, 1255-1256 (5th Cir. 1977). Thus, "the threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." Sandstrom v. Montana, 442 U.S. 510, 514 (1979), citing Ulster County Court v. Allen, 442 U.S. 140 (1979). In this regard, this Court stated as follows:

> "That determination requires careful attention to the words actually spoken to the jury, (cite omitted), for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."

Sandstrom, supra at 514.

As recognized by this Court, "Inferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime...from the existence of one or more 'evidentiary' or 'basic' facts." Ulster County Court, supra, at 156. The main test is whether the inference or presumption

undermines the responsibility given to the finder of fact at trial to find the ultimate facts beyond a reasonable doubt based on the evidence presented by the state.

This Court also distinguished between permissive presumptions or inferences and mandatory presumptions, noting that a permissive presumption or inference "allows but does not require the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and...places no burden of any kind on the defendent." Ulster County Court, supra, at 157. On the other hand, mandatory presumptions tell "the trier of fact that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." Id., at 157.

As noted by the state habeas corpus court, the charge in the instant case at most creates a permissive presumption or inference. It allows, but does not require, the jury to infer or presume certain facts once the state has proven other basic facts. The jury was specifically instructed that these presumptions could be retutted. The court went on to note that criminal intention would not be presumed and that a specific intent was an essential element. The jury was merely informed that they could either infer intent from proven circumstances or acts or conduct or could presume intent under specific circumstances.

The Supreme Court of Georgia has addressed a similar instruction in light of Sandstrom, supra and determined that the charge when viewed as a whole created merely a permissive presumption that places no burden on the defendant. Skrine v. State, 244 Ga. 520, 521, 260 S.E.2d 900 (1979). This finding

by both state courts is clearly supported when considering the charge as a whole.

As the charge merely creates a permissive presumption, the Petitioner must demonstrate that the instruction is invalid as it applies to him, that is, that in this particular case, he must show that there is no rational way a trier of fact could make the particular connection allowed by the inference. Ulster County Court, supra, at 157. As no such showing has been made in the instant case, the charge was clearly correct as applied to the Petitioner. Thus, counsel did not err in failing to challenge this charge.

Based on the totality of the circumstances, including Petitioner's insistence on representing himself and not confiding in his co-counsel, it is clear that Petitioner received effective assistance of counsel as set forth in the standard applied in the state courts and in the prevailing standard applied in the federal courts. Thus, this allegation by the Petitioner presents no federal question for review by this Court.

F. THE TRIAL COURT DID NOT EXCLUDE ANY RELEVANT MITIGATING EVIDENCE DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL.

Petitioner has asserted that the trial court excluded mitigating evidence during the sentencing phase of his trial. Respondent asserts that the evidence excluded was not relevant to the question of mitigation and, therefore, was properly excluded.

At the sentencing phase, the only evidence presented by the Petitioner in his own behalf was his own testimony. To facilitate the presentation of this evidence, Mr. Richard Smith directed questions to the Petitioner. Petitioner related information concerning his background, his brothers and sisters and the health of his family. Petitioner also testified about his background in the Marine Corps and in the Army. (T. 1121-1122). Petitioner testified that he had two children and that he loved both of them. (T. 1124).

After this information was elicited, Mr. Richard Smith proceeded with the following statement: "You told us just yesterday that you didn't kill these girls." (T. 1124). After Petitioner responded that he did not kill them, the district attorney objected because "that issue has been decided, its over and behind us, it cannot be in mitigation from punishment at this time." (T. 1124). A lengthy discussion was held between the district attorney, Mr. Richard Smith and the court concerning this question. The court finally decided

that Mr. Smith could continue, but he directed that the questions establish mitigation and not legal justification. Mr. Richard Smith then proceeded to ask the Petitioner if he believed that he did not kill the women and if he recalled having killed the women. (T. 1126). He was finally asked if he believe his testimony during the guilt-innocence phase to be true. The district attorney objected again at this point stating that it was merely a denial of the commission of the crime. Mr. Richard Smith indicated that he was trying to present evidence showing that the Petitioner did not believe that he committed the crime. As noted by the district attorney, "this is trying to imply some kind of mental issue in the trial which has not been raised by any competent evidence whatsoever during the course of the trial." (T. 1127). The court at that point sustained the objection. Mr. Richard Smith was allowed to continue and asked the Petitioner questions concerning whether he felt remorse about the crime. (T. 1128).

It is undisputed that there was no question raised as to the Petitioner's mental state at the time of the crime prior to the sentencing hearing. As a matter of fact, Petitioner had been submitted to two psychiatric examinations and had refused to continue with any further examinations. No evidence was produced in the state habeas corpus court to show anything further that Petitioner would have testified to had the objection not been made at the trial court. Petitioner was allowed to testify that he did not recall killing the women and was allowed to emphasize the fact that

he did not commit the murders or that he did not believe that he committed the murders. No further information was shown at the state habeas corpus court that the Petitioner could have been given that he was precluded from presenting to the jury.

In actuality, the court properly limited Petitioner's testimony to questions concerning mitigation as opposed to questions concerning guilt or innocence. Thus, the court merely restricted Petitioner's evidence to relevant mitigating evidence.

The instant case is clearly distinguishable from Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978). In both of those cases, this Court ruled that relevant mitigating evidence could not be excluded from the jury's consideration. Whether or not Petitioner actually committed the crime was not relevant at the time of sentencing as the jury had previously convicted him of the commission of the crime. Petitioner was allowed to testify that he did not recall committing the crime and that he believed his testimony was true. This is the extent of the relevance of any of this testimony and the court should be allowed to place some limitations on the admission of irrelevant evidence. Further, before determining that mitigating evidence was excluded, this Court should require that the Petitioner make some showing of what evidence would have been presented. It would appear from a consideration of the transcript that everything trial counsel sought to have included was presented to the jury. No further showing has been made of what evidence or statements the Petitioner could

have made.[12/]

Based on the above it is clear that no relevant mitigating testimony was excluded at the sentencing hearing. Thus, as found by the state habeas corpus court, the trial court acted within its authority and properly held the witness within reasonable hounds in presenting relevant mitigating evidence. Exclusion of testimony relative to guilt or innocence was not unreasonable or improper. Thus, this allegation presents no federal question for review by this Court.

12/ It is relevant to note at this point that the Petitioner did not testify in his own behalf at the state habeas corpus hearing, and thus, did not make any statements concerning what else he would have testified to before the jury.

CONCLUSION

For the above and foregoing reasons the petition for a writ of certiorari filed on behalf of William Henry Hance should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition upon the Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper postage affixed thereto and addressed to:

Mr. Leonard M. Marks
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This 6th day of April, 1982.

Mary Beth Westmoreland
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